Although it would not be appropriate to rely on the experience of any foreign country in adopting special access regulation, the Ofcom BCMR analysis is particularly unreliable. The market definitions it adopts, for example, are based not on a comprehensive market analysis, but instead on a "sample of 450 companies that purchase Business Connectivity Services . . . interviewed by telephone in January and February 2007" by a third party.[141] Further, while Ofcom ultimately concluded that BT possessed "Significant Market Power" in most of the retail and wholesale markets Ofcom defined, the survey of business customers demonstrated just the opposite – "[t]he vast majority thought the market competitive in terms of range, quality and price."[142] Moreover, U.K. companies indicated that they enjoy significant competition even though cable is far less prevalent in the U.K. than in the United States – another factor that makes the U.K. an inapt model. Although BT claims (citing a 2006 study) that it "noted to Ofcom that cable company facilities passed . . . 85 percent of UK businesses,"[143] Virgin Media –

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www.ofcom.org.uk/research/telecoms/reports/broadband_speeds/broadband_speeds/broadbandspeeds.pdf. pp 3, 9 and 23 (July 28, 2009).

[140] *See* IDATE, *Broadband Coverage in Europe*, http://ec.europa.eu/information_society/eeurope/i2010/docs/benchmarking/broadband_coverage_2008.pdf at 195 (Dec. 2008) (showing 48 percent cable modem coverage since 2004); The Berkman Center for Internet & Society at Harvard University, *Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy from Around the World (Draft)*, http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf at 102, 104(Oct. 2009).

[141] Ofcom, Business Connectivity Services Review, http://www.ofcom.org.uk/consult/condocs/bcmr/bcmr_research/research.pdf, § 1.5 (Jan 17, 2008).

[142] *Id.* § 8.4 ("[a]ll respondents were asked how competitive they thought the Business Connectivity services market was in terms of the range of services offered, and the quality and price of those services. For all three areas more than four fifths of respondents thought that the market was extremely or fairly competitive").

[143] BT Comments at 18.

the only major cable company in the U.K. – is capable of providing broadband service to only about half of households passed.[144]

Sprint suggests that the Commission compare special access rates to the rates for point to point services in foreign countries, such as the United Kingdom.[145] Even if it were possible to make an apples to apples comparison between special access services with the high capacity services offer in the United Kingdom, there is no reason why the competitive price in both countries should be the same. It is not uncommon for the competitive prices of everyday goods and services (calculated in U.S. dollars) to vary widely between countries for a variety of reasons. For example, a 2-liter bottle of Coca-Cola sells for only $0.78 in South Africa, but it is $4.06 in Germany.[146] A Big Mac® sells for only $1.83 in China, but it is $7.02 in Norway.[147] Because there is no reason to believe that competitive markets would be the same in two different countries, there is no reason to compare special access prices in the United States to the rates for high capacity services in any other country.

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[144] OfCom, The Communications Market Report 2008 http://www.ofcom.org.uk/research/cm/cmr09/cmr09.pdf at 15, Figure 1.1 (2009).

[145] *See, e.g.*, Sprint Comments at 28 ("[a]nother potential benchmark the Commission can use to determine the reasonableness of special access rates is the price for similar services in other industrialized nations").

[146] *See* http://www.walletpop.com/specials/food-price-comparison-around-the-world.

[147] *See* The Economist, *The Big Mac Index* http://www.economist.com/daily/chartgallery/displaystory.cfm?story_id=15210330. (Jan. 6, 2010) (last visited February 23, 2010).

## IV. THE COMMISSION'S ANALYTICAL FRAMEWORK SHOULD CONSIDER THE BENEFITS OF DISCOUNT PLANS FOR SPECIAL ACCESS SERVICES AS FURTHER EVIDENCE OF COMPETITION.

The fact that incumbent carriers offer discount plans is itself further evidence that incumbent carriers face competition for special access services. In the absence of competition, incumbent carriers would have no reason to offer any discounts from their "rack" rates for special access services. But just the opposite has occurred here. Since the advent of pricing flexibility, Verizon and other incumbent carriers have responded to market forces and introduced a variety of discount plans and innovative options. Approximately 90 percent of Verizon's revenue from carrier customers for DS1 and DS3 services comes from purchases through discount plans.[148]

The mere existence of these discount plans and innovative options is itself proof of effective competition for high capacity services, including special access. As Dr. Topper explained, "[t]he profusion of different tariffs and agreement structures is, if anything, an indication of competition; in order to capture and retain the business of prospective buyers, suppliers offer both price discounts and non-price benefits in a number of different dimensions, including service and simplified administration." Topper Decl. ¶¶ 68; *see also* Topper Reply Decl. ¶ 16. The Commission has likewise recognized that term and volume commitments are hallmarks of competition. In the *Joint Cost Order*, the Commission found that "[i]n a competitive market, companies devote extensive resources to retaining and attracting customers"

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[148] *See* Verizon's 2007 Comments at Attachment B: Supplemental Declaration of Quintin Lew ¶ 23 ("Lew Supp. Decl.").

and that "these efforts include sales presentations, advertising campaigns, discounts for volume purchases or long-term commitments, and other inducements."[149]

Second, the benefits that customers of special access services enjoy through these discount plans are competitive benefits. A customer does not have to obtain high capacity service from a competitor to enjoy the benefits of competition. Verizon has introduced generally available volume and term discounts – which provide discounts of up to 67 percent off month-to-month rates – as well as a large number of contract tariffs that are designed to meet the needs of individual customers and provide even greater discounts. Lew/Recine Decl. ¶¶ 9-25. The fact that customers of incumbent carriers can obtain discounts for special access services is a benefit that flows directly from the availability of competitive alternatives and market pressures. Customers can and do benefit from competition through the lower prices they pay for high capacity services even if they continue to receive them from incumbent carriers. Topper Decl. ¶¶ 67. In addition, the additional certainty of revenues made possible through multiyear commitments facilitates Verizon's ability to make substantial investments in broadband network infrastructure to support next generation services, such as backhaul for LTE and 4G wireless services. Lew/Recine Decl. ¶¶ 28.

Moreover, Verizon's voluntary discount plans that include multiple products and multiple geographic areas are a response to customer requests, and in the case of pricing flexibility contracts, to the bargaining power of large sophisticated customers who demand discounts across different services and geographic areas. Lew/Recine Decl. ¶ 41. As Dr. Topper explained,

[149] *Amendment of Parts 32 and 64 of the Commission's Rules to Account for Transactions between Carriers and Their Nonregulated Affiliates*, 8 FCC Rcd 8071, ¶ 17 (1993) ("*Joint Cost Order*").

"[m]any purchasers of special access and other high-capacity services are large, sophisticated buyers . . . operating on a regional or national scale who purchase services for multiple locations in different geographic areas [and] discipline pricing across different geographic regions." Topper Decl. ¶ 60. Incumbent carriers have responded by "introduc[ing] contract tariffs (*i.e.*, individually negotiated service contracts) that provide discounts based on total billed revenue; under these plans, buyers receive a discount regardless of the particular location of a circuit." Topper Decl. ¶ 60.

Verizon's experience in this regard is not unique. AT&T noted that "[i]n the vast majority of cases, special access customers demand uniform pricing throughout broad geographic areas, and thus negotiated contracts do not contain different prices or discounts for different locations based on perceptions of how many competitive alternatives are available on specific routes."[150]

Several commenters challenge certain terms and conditions that appear in special access tariffed discount plans. None of these commenters offers an analytical framework under which the Commission could evaluate these terms and conditions. Rather, they simply offer their own subjective interpretations of these tariff provisions and ask the Commission to ban them. As explained below, there is no basis for the Commission to take such action.

The commenters' challenges to certain terms and conditions in discount plans are based on the false premise that customers lack choices and are required to accept them. For example, No Choke Points claims that "[s]everal ILECs include tying arrangements in their special access offerings" which it describes as making "the ability to purchase a product in a non-competitive

[150] AT&T Comments at 44.

area contingent on the purchase of that product in an area where a competitive provider may be available."[151] This claim is unfounded because there is no "requirement" for any customer to purchase multiple special access services in different areas in order to receive a discount. As Dr. Topper explained, "[c]ustomers are not forced to accept the terms of a discount plan or contract tariff; customers and suppliers alike enter these agreements voluntarily, hence both parties benefit." Topper Decl. ¶ 67. Customers that do not wish to commit to purchases of multiple special access services across multiple geographic areas can choose another discount plan, such as Verizon's circuit-specific discount plans, which provide substantial discounts on even a single special access circuit. Lew/Recine Decl. ¶¶ 14-17.

Level 3 expresses concern that pricing flexibility contracts impose terms and conditions on the "conversion of unbundled network elements."[152] These so-called UNEs conversion terms do not appear in Verizon's generally available discount plans, and are only included in a handful of pricing flexibility contracts that were tailored for the needs of large carrier customers that had a say in developing those terms and conditions. These terms only apply to the UNEs the customer purchases from Verizon. In any event, these conditions are purely voluntary because customers can choose other discount plans and pricing flexibility contracts that don't contain such terms and conditions. If a customer voluntarily negotiates a pricing flexibility contract that provides credits for converting some portion of the UNEs it purchases from Verizon to special access services, the customer has done so based on an evaluation of its individual network needs,

[151] No Choke Points Comments at 28; *see also* Level 3 Comments at 26 (Verizon pricing flexibility contract tariffs contain "at least one provision that ties the purchase of channel terminations (the least competitive product market) to mandatory purchases of interoffice transport (a more competitive product market)").

[152] Level 3 Comments at 26.

tolerance of risk for the continued availability of UNEs, and additional benefits they may receive by converting their UNEs to special access services. As Dr. Topper explained, "[i]n addition to the obvious benefit of reduced prices, buyers reduce their transaction and search costs and may receive specialized or customized services or contract terms in return for volume and term commitments and agreements to convert UNEs to market-based services." Topper Decl. ¶ 67.

Sprint claims that "some incumbent LECs calculate early termination liability by multiplying the number of committed circuits by the non-discounted month-to-month rate times the number of months remaining in the plan."[153] This is not true for Verizon. Verizon has introduced several non-circuit specific discount plans that allow customers freely to move individual circuits in and out of service, without incurring a fee for terminating a particular circuit, as long as they maintain a minimum volume commitment (which for most plans is less than 100 percent) and satisfy the minimum in-service period (which is typically one year). Lew/Recine Decl. ¶ 22. This allows customers to migrate circuits to their own networks or to competitive providers without penalty provided that they satisfy the required volume commitment. Verizon also has introduced circuit-specific plans that provide the same level of discounts without requiring any volume commitment. In the event of early termination of a discount plan, the customer is merely required to pay the difference between the discount it received based on the original term commitment and the discount to which it would have been entitled based on the actual term for which the circuit was in service, and for non-circuit specific plans, the term of years the customer served in the plan. Lew/Recine Decl. ¶¶ 18, 22, 29-32.

[153] Sprint Comments at 41; *see also* No Choke Points Comments at 30.

Sprint also claims that some carriers "impose very high charges to perform circuit migrations."[154] As an initial matter, the term "circuit migrations" is a misnomer. Circuit migrations occur where a customer wishes to reconfigure an existing special access circuit so that part of it is provided by a competitor and part of it continues to be provided by the incumbent carrier. When a customer disconnects a special access circuit entirely and replaces it with a competitor's high capacity service, there is no "circuit migration" and no circuit migration charges apply.

Moreover, when a customer does request a circuit reconfiguration, there is physical work that has to be performed. For example, if a customer wishes to disconnect a portion of transport on a circuit and replace it with a competitor's transport, the incumbent carrier will need to rewire the circuit in the central office. Typically, this will involve unhooking the DS1 portion of a customer's circuit and transferring it to a facility that connects to a competitor's collocation arrangement. This will require Verizon's technician to remap the DS1 channel termination and may also require Verizon's technician to redesign the DS1 circuit to enable it to work properly in the new configuration. It will also involve some testing to ensure that the circuit is working properly after the reconfiguration. If the customer wishes to perform the circuit reconfiguration after business hours, Verizon will schedule a technician to perform that work. Verizon's circuit rearrangement charges are based on the labor costs associated with performing this rewiring of the circuit.

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[154] Sprint Comments at 41.

## V. The Commission Should Allow the Parties To Have Access to the Collected Data Under the Terms of the Protective Order in this Proceeding.

If the Commission decides to collect data for a further competitive analysis, which it should before even considering changes to its current price flexibility rules, the Commission should allow the parties to review that data and provide comments on how the Commission should interpret that data in its competitive analysis. Because some of this data will be competitively sensitive, the Commission's existing protective order in this proceeding should preserve the confidentiality of such data.

No Choke Points recommends that the Commission prohibit all of the parties from having any access to the raw data and instead rely on its staff's aggregation of such data.[155] The Commission should instead allow the parties to have restricted access to such raw data under the terms of the protective order that has already been entered in this proceeding.

This would certainly not be the first time the Commission has gathered "highly sensitive proprietary information" from high capacity service providers. Verizon and other carriers have already submitted volumes of such competitively-sensitive information in other Commission proceedings, such as merger dockets and forbearance proceedings. In these proceedings, the Commission issued protective orders that preserved the confidentiality of such information, but allowed the parties access to that information on a restricted basis. The fact that other parties may have to submit the same type of information is hardly a reason for prohibiting all access to such information.

[155] *See* No Choke Points Comments at 36-38. No Choke Points claims that its proposal is based on Sprint's June 22, 2009 ex parte letter, but Sprint does not make this proposal in its comments filed on January 19, 2010.

No Choke Point's proposal would also limit the Commission's options in making a decision in this rulemaking proceeding. For example, if the aggregate information only shows competition at an MSA level, the Commission would not be able to use that aggregate information to issue a decision that would assess competition on the basis of a different geographic area, such as a rate zone or cluster of wire centers in an MSA. Similarly, if the aggregate information includes only a simple percentage of buildings served, the Commission would not be able to develop a competitive assessment that weights a 100,000 square foot office building more heavily than a 1,000 square foot office building.

## VI. THERE IS NO BASIS FOR THE COMMISSION TO EXPAND THIS PROCEEDING TO ADDRESS THE REGULATORY FRAMEWORK FOR ETHERNET AND OPTICAL SERVICES.

The premise of this proceeding is to "determine whether the Commission's pricing flexibility rules have worked as intended" for TDM-based special access services (*e.g.*, DS1s and DS3s) that are provided by incumbent carriers.[156] As explained above, there is ample evidence in the record that shows TDM-based special access services are subject to competition and that the Commission's pricing flexibility rules are working. But even if the Commission decides to conduct a further analysis with respect to those services, there is no basis to expand this proceeding to consider the current regulatory framework for services, such as Ethernet and OCn services, that are no longer subject to such regulation by the Commission, as PAETEC and others suggest.[157]

[156] *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, Public Notice, 24 FCC Rcd 13638, at 1 (2009) ("*Public Notice*").

[157] PAETEC, *et al.*, Comments at 36-42.

The Commission has repeatedly recognized that these enterprise broadband services are "highly competitive" and that "there are a number of competing providers for these types of services."[158] The Commission has also recognized that there is "substantial deployment of competitive fiber loops at OCn capacity and competitive carriers confirm they are often able to economically deploy these facilities to the large enterprise customers that use them."[159] The Commission has also found that competing carriers are able to deploy new OCn-level facilities without significant difficulty because these types of facilities "produce revenue levels which can justify the high cost of loop construction, providing the opportunity for competitive LECs to offset the fixed and sunk costs associated with the loop construction."[160]

Moreover, incumbent carriers have no special advantage with respect to these new, higher capacity services. The incumbent carriers' embedded metallic cables are not capable of

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[158] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304, ¶ 98 (2007). *See also, e.g., SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, ¶ 73 n.223 (2005) (finding that competition "in the enterprise [segment of the] market is robust" and likely to grow even more vigorous); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 74 (2005) ("*Verizon-MCI Order*") (finding that "myriad providers are prepared to make competitive offers" to enterprise customers for services including Frame Relay among others, and that "these multiple competitors ensure that there is sufficient competition"); *id.* ¶ 75 n.229 (finding that "new competitors" – including "systems integrators and managed network providers" and those offering "IP-VPNs and other converged services" – "are putting *significant competitive pressure* on traditional service providers" with respect to enterprise customers) (emphasis added).

[159] *See, e.g., Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 183 (2005) (subsequent history omitted).

[T] *Triennial Review Order* ¶ 316.

providing many of the higher capacity new services that customers are now demanding. In many cases, incumbent carriers must replace these metallic cables with fiber cables and associated electronics in order to provide these higher capacity services. Incumbent carriers are therefore on the same footing as any competitor offering these services. Both incumbents and competitors must deploy the facilities necessary to provide the new, higher capacity services demanded by customers.

This is especially true with respect to backhaul for wireless carriers. In order to deliver the higher capacity required by newer generation wireless broadband networks, any backhaul provider will have to deploy fiber, microwave and other non-copper facilities in the first instance that are needed to deliver those higher capacities. As explained in Section II.A., *supra*, there are a number of providers that are capable of deploying such facilities, including cable companies and fixed wireless providers. Incumbent carriers do not have any special legacy advantage in providing these services.

It has been nearly four years since Verizon obtained forbearance for these services and the Commission's prior conclusions regarding competition for these services are even truer today. Competitors are touting their successes in providing Ethernet services in the marketplace. For example, PAETEC is "expanding the footprint and capacity of its IP NGN network to keep up with increasing demand from the growth of IP and Ethernet services using the Cisco XR 12000 Series Routers."[161] Level 3 claims that "[f]or transport services, . . . including Ethernet

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[161] PAETEC Press Release, *PAETEC Announces Its Standardization on Cisco IP NGN Nationwide*, http://phx.corporate-ir.net/phoenix.zhtml?c=190031&p=irol-newsArticle&ID=1373518&highlight=. (Jan. 11, 2010) (last visited on February 24, 2010).

private lines, particularly for end-to-end services, pricing is flat and demand is up strongly."[162] Tw telecom, one of the proponents of more regulation of TDM-based services, "already boasts 'the third highest market share of retail Ethernet ports in service.'"[163] Tw telecom also noted that "[r]evenue from enterprise customers has increased for the past 29 consecutive quarters, including the three months ended September 30, 2009, primarily through sales of our data and Internet services such as Ethernet and IP based products."[164] Moreover, tw telecom, acknowledges that "the incumbent LECs have a large but, by comparison with TDM services, relatively modest, market share in the provision of Ethernet services."[165] Given the fact that competition is extensive and widespread for these services, the Commission should continue to confine this proceeding to whether additional regulation is appropriate for the lower capacity TDM-based services.

Notwithstanding the evidence of extensive competition for these services, tw telecom complains that "incumbent LECs have been reluctant to offer Ethernet services aggressively."[166] Verizon is not at all reluctant to offer wholesale and retail Ethernet services. In fact, Verizon

**[BEGIN CONFIDENTIAL]**

[162] *Level 3 Communications and Citi Credit Conference – Final*, FD (Fair Disclosure) Wire, Transcript 11809a2551389.789 (Nov. 18, 2009) (statement by Level 3 SVP and Corporate Treasurer Robin Grey).

[163] tw telecom Press Release, "ENETsolutions Selects tw telecom to Power New State-of-the-Art 'Solution Center'", http://www.twtelecom.com/Documents/Announcements/News/2009/ENETsolutionsFinal.pdf Oct. 13, 2009.

[164] tw telecom inc., Form 10-Q, at 28 (SEC filed Nov. 6, 2009).

[165] tw telecom Comments at 23.

[166] tw telecom Comments at 23.

**[END CONFIDENTIAL]**. Moreover, as of 2009, Verizon has over 1,500 contracts for forborne services, such as Ethernet and OCn services, with a total contract value of approximately $2 billion.

Given the fact that competitors and incumbent carriers are aggressively providing these services, there is no evidence of any market failure and no basis for the Commission to impose any regulatory restrictions on these services.

## VII. THE COMMISSION MUST COLLECT AND ANALYZE COMPETITIVE DATA BEFORE IMPOSING MORE STRINGENT REGULATIONS ON SPECIAL ACCESS SERVICES.

The Commission was correct in soliciting "concrete suggestions on the appropriate analytical framework for determining whether the current rules are working."[167] The Commission was also correct in determining that it must collect and use "data to determine systematically whether the current price cap and pricing flexibility rules are working properly to ensure just and reasonable rates, terms, and conditions and to provide flexibility in the presence of competition."[168] It is only after the Commission has collected and analyzed such data that the Commission could begin to consider whether any changes to its rules might be warranted.

In a classic case of putting the cart before the horse, several commenters ask the Commission to impose more onerous regulations on incumbent carriers even before the Commission has determined the appropriate analytical framework, collected any competitive data or initiated any further competitive analysis. The Commission cannot impose more onerous regulatory requirements on special access services in the absence of any findings to show that

[167] *Public Notice* at 2.

[168] *Id.*

competition has declined since the current regulatory regime was put in place. In light of the evidence that competition has grown since then, there is simply nothing in the record to support their request for the Commission to impose more stringent regulatory requirements.

Level 3 attempts to justify its request for the Commission to impose immediately more regulations on the basis of its claim that there are impending "shifts in the special access market."[169] According to Level 3, "some of the plans that have had a substantial downward impact on ILEC special access pricing are being eliminated altogether or grandfathered as a prelude to elimination."[170] Level 3's concern is unwarranted.

As a preliminary matter, Verizon offers many discount plans under generally available tariff provisions. Verizon has no plans to eliminate or grandfather these tariffed plans. Verizon's special access customers can continue to enjoy the benefits of the discounts under these plans.

Moreover, Level 3's real concern seems to be that "a number of [Verizon's] contract offers will expire in two to three years." But this observation is not cause for alarm and does not mean there is any impending "shift" in special access prices. It simply reflects the fact that customers negotiate contract tariff terms for a fixed term of years and at any point in time some of those contracts will be expiring in two or three years.

These multi-year contracts have been negotiated since the Commission first granted pricing flexibility. Customers can and frequently do negotiate new contract tariffs as their existing contract tariffs are expiring. Lew/Recine Decl. ¶ 42. In fact, since receiving pricing

[169] Level 3 Comments at 20.

[170] Level 3 Comments at 20-21.

flexibility in 2001, Verizon has tariffed 56 unique customer-specific pricing flexibility offerings for non-affiliate customers; 10 of these were tariffed in the past two years alone. Lew/Recine Decl. ¶ 36. And the evidence shows that as customers have negotiated new contract tariffs over time, the real prices customers pay for special access services have continued to decline. Level 3 has the same ability to negotiate a contract tariff with Verizon as any other customer. Nothing has changed or is about to change that would warrant the Commission imposing any sort of more stringent regulations immediately.

### A. The Commission Should Not Implement a Freeze on All Special Access Rates, Terms and Conditions Pending the Outcome of This Proceeding.

Even though it is entirely premature to impose any additional restrictions on special access services, Level 3 asks the Commission to apply a freeze "to both standard 'rack' rates and any and all discounts, credits, and other mechanisms and structures that affect the ultimate amount that a customer pays to the ILEC for interstate special access services."[171] In addition, Level 3 argues that "customers should be given the right to renew until new rules take effect any expiring or grandfathered tariff purchase plans, contract tariffs, and any and all other purchasing arrangements regardless of whether there are any limitations on renewal or expiration specified currently in the tariffs."[172] There is no justification for the Commission to impose such draconian restraints on special access services.

Many of Verizon's special access tariff rates remain subject to the Commission's price cap rules. If Verizon were to attempt to increase any of those tariff rates, Verizon would have to justify that increase under the Commission's rules. For example, Verizon may choose to

[171] Level 3 Comments at 23; *see also* PAETEC, *et al.*, Comments at 85.

[172] *Id.*

restructure its special access rates in a manner that reduces some rate elements while increasing other rate elements. Even though such a restructure could not generate any increased revenues under the Commission's price cap rules and may lead to overall reductions in special access revenues, Level 3's proposed freeze could prohibit incumbent carriers such as Verizon from making such rate restructures.

Moreover, such a freeze could interfere with competitive negotiations for contract tariff offerings. For example, a customer with an expiring contract tariff may wish to negotiate a smaller discount in exchange for a smaller volume commitment or a shorter term commitment. Such a negotiated arrangement might be more beneficial to the customer than renewing its expiring contract tariff. However, under Level 3's proposed freeze, such negotiations could be prohibited because they would inevitably "affect the ultimate amount that a customer pays" to Verizon.

Level 3 also requests that the Commission freeze "any new grants of pricing flexibility during the pendency of this proceeding."[173] Level 3 attempts to justify this proposal on its theory that "collocation-based, MSA-wide pricing flexibility triggers provide little insight into the state of competition in the special access market."[174] But Level 3 is simply asking the Commission to make a determination on one of the questions posed in its Public Notice before the Commission has adopted an analytical framework or even requested data for a competitive analysis.

[173] Level 3 Comments at 23; *see also* Sprint Comments at 6 ("[o]n an interim basis, the FCC can and should suspend current Phase II pricing flexibility rules and bring service currently subject to Phase II pricing flexibility back under price cap regulation"); PAETEC, *et al.*, Comments at 87 ("the Commission should cease granting any new applications for pricing flexibility until it has adopted a new framework for such grants").

[174] *Id.*

To the extent Level 3 is interested in promoting competitive rate reductions for special access services, Level 3 should not be trying to close the door on all pricing flexibility. Level 3 should instead recommend that the Commission grant contract tariff pricing flexibility everywhere. Under such pricing flexibility, the incumbent carrier may offer discounts in contract tariffs on one day's notice, so long as the quantities of services provided pursuant to contract tariffs are removed from price caps. Incumbent carriers receiving contract tariff pricing flexibility must maintain their generally available, price cap constrained tariffed rates for these services. Granting contract tariff pricing flexibility everywhere would give incumbent carriers greater flexibility to negotiate special access rate reductions while continuing generally available special access rates under price caps.

### B. The Commission Should Not Adopt an Interim X-Factor.

As the Commission noted, the current special access X-factor adjustment is set equal to the inflation adjustment and they therefore "cancel each other out."[175] This means that "special access price cap rates are essentially frozen at 2003 levels until a new X-factor is set."[176] The real value of the rates permitted by the caps (relative to inflation), therefore, falls each year with inflation, at between 2 and 3 percent in recent years.[177]

Sprint proposes that the Commission "adopt an interim X-factor of 5.3 percent in time for that X-factor to be applied to the incumbent LEC's next annual tariff filing scheduled for

[175] *Public Notice* at 5 n.23.

[176] *Id.*

[177] *See* Reply Comments of Verizon, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM No. 10593 (Aug. 15, 2007) at Attachment A: Supplemental Reply Declaration of William E. Taylor, ¶ 59.

implementation in July 2010."[178] There is nothing in the record to justify imposing a new X-factor on incumbent carriers' special access rates. In fact, the Commission's prior attempts to establish X-factors have met with repeated judicial determinations that the Commission "failed to state a coherent theory supporting its choice of" a particular X-factor.[179]

The Commission has not collected any evidence that would support adoption of a new X-factor. Nor has the Commission collected any evidence to justify changing the current X-factor from its current level. In the absence of record evidence, it would be arbitrary and capricious to change the current X-factor to 5.3 percent.

### C. The Commission Cannot Delegate Special Access Price Setting to a Commercial Arbitration Process.

Global Crossing urges the Commission to implement "final offer" arbitration for transport rates, terms and conditions. According to Global Crossing, "'[f]inal offer' arbitration is a form of arbitration in which both parties submit their best and final offers to an arbitrator, who then selects the most reasonable one to form the basis for the parties' service arrangement."[180] There is no basis for the Commission to adopt the arbitration process proposed by Global Crossing.

As an initial matter, the Commission has no legal authority to mandate that carriers engage in commercial arbitration under the Federal Arbitration Act ("FAA"). As the Supreme

[178] Sprint Comments at 46; *see also* PAETEC, *et al.*, Comments at 88.

[179] *USTA v. FCC*, 188 F.3d 521, 526 (D.C. Cir. 1999); *see Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 329 (5th Cir. 2001) ("[t]he new X-Factor suffers from the same infirmity as the prior one: the FCC has failed to show a rational basis as to how it derived the 6.5 percent figure").

[180] Global Crossing Comments at 10-11.

Court has repeatedly held, commercial arbitration is "'a matter of consent, not coercion.'"[181] That is because "arbitrators derive their authority to resolve disputes *only because the parties have agreed* in advance to submit such grievances to arbitration."[182] Mandated commercial arbitration is an oxymoron, and flatly prohibited by the FAA. Indeed, when a state commission, exercising its authority under § 252 over interconnection agreements, sought to mandate private arbitration of disputes between an incumbent local exchange carrier and a competitive local exchange carrier, a federal district court flatly rejected that effort, holding that, while arbitration is permissible when it is "optional and voluntary," mandating arbitration "conflicts with the 1996 Act" and "contravenes the principles underlying" the FAA.[183]

Moreover, the Commission does not have authority to prescribe a rate in an arbitration of a private contract between a carrier and a customer. Section 205 of the Act authorizes the Commission to prescribe rates only where the Commission has first found a rate to be unlawful:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed. *See* 47 U.S.C. § 205(a).

Under Global Crossing's arbitration proposal, there would be no investigation or hearing with respect to any existing rate or any finding that an existing rate is unlawful. The Commission

[181] *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (quoting *Volt Info. Scis., Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989)).

[182] *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986) (emphasis supplied).

[183] *Verizon New York Inc. v. Covad Communications Co.*, No. 1:04-CV-265 GLS/DRH, 2006 WL 278281, at *4-*7 (N.D.N.Y. Feb. 3, 2006).

would merely select a rate for use in a private contract between a carrier and a customer. Such rate setting is not authorized by Section 205 or any other provision of the Act.

Even aside from the fact that the Commission therefore lacks authority to impose the "final offer" arbitration that Global Crossing proposes, the Commission should reject this proposal because it would produce unreasonable results.

First, any rates, terms, and conditions for special access services established through final offer arbitration would have to be tariffed and would be available to other carriers. Carriers, therefore, would have the incentive to use the arbitration process to ratchet-down incumbent carriers' special access rates, terms, and conditions. Any "wins" by a purchaser would presumably be available to other carriers as a contract tariff. "Losses," on the other hand, would at most affect only the arbitrating purchaser – assuming it was bound to abide by the arbitration result and could not choose to purchase instead from another available tariff.

Second, the common carrier nature of incumbent carriers' TDM-based special access services raises a significant distinction with the *Hughes/News Corp. Order*[184] that Global Crossing takes as its model.[185] In that case, the Commission imposed an arbitration requirement to eliminate News Corp.'s ability to use "programming withdrawal" – *i.e.*, to refuse to offer its Regional Sports Network ("RSN") programming at all to a particular cable system – "as a bargaining tool."[186] Here, in contrast, incumbent carriers have no right to use "temporary

[184] *General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004) ("*Hughes/News Corp. Order*").

[185] *See* Global Crossing Comments at 12-13.

[186] *Hughes/News Corp. Order* ¶ 174; *see id.* ¶ 175 (noting that the "staff analysis has found that the allure of temporary withholding to News Corp. is substantial"). The Commission, moreover, based its decision to impose this condition on the merger in light of a "unique

withholding" of their tariffed special access services as a bargaining tool. Nor could incumbent carriers do so credibly in any event, given the extensive competitive fiber and intermodal offerings that Verizon and others have demonstrated have already been (or could be) deployed.

Third, although the arbitration requirement imposed on News Corp. applied only to the price that cable companies would pay for access to News Corp.'s 12 RSN offerings, and contracts would last at least three years,[187] the final offer arbitration proposals here would extend to all of the many facilities and services that incumbent carriers offer in their special access tariffs; to terms and conditions, as well as rates; and arbitrated results would last for a maximum of three years (despite the current availability of longer-term agreements with higher discounts). As a result, arbitrations of special access rates, terms, and conditions would be more frequent and vastly more complicated than under the *Hughes/News Corp. Order.*

Fourth, the Commission concluded in 2001 that "[e]xperience" at the state commissions "suggests that 'final offer' arbitration may not always afford the arbitrator sufficient flexibility to resolve complex interconnection issues."[188] Although Congress used the term "arbitration" in § 252(b), proceedings to resolve disputes about the terms that will be included in interconnection

combination of News Corp.'s RSN programming assets and DirecTV's nationwide distribution platform" and concluded that its existing "program access rules" would not be "sufficient to protect against the[] likely *transaction-specific* harms." *Id.* ¶¶ 147, 172 (emphasis added).

[187] *See id.* ¶¶ 49 n.172, 177.

[188] *Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, As Amended*, Order, 16 FCC Rcd 6231, ¶ 5 (2001); *see also Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 17 FCC Rcd 27039, ¶¶ 30-35 (Wireline Comp. Bur. 2002) (explaining that the Commission's staff did not use final offer arbitration in the first Commission proceeding under § 252(e)(5) to arbitrate the terms of an interconnection agreement).

agreements are in no sense equivalent to private, commercial arbitrations.[189] Congress expressly mandated participation in such proceedings, which are before a public body – not a private individual – and provided for extensive federal court review of the state commissions' rulings, none of which is true of private, commercial arbitration under the FAA. In fact, § 252 arbitrations are hardly a model to emulate when it comes to determinations about rates – the state proceedings were lengthy in and of themselves and engendered nearly endless litigation. The one time the Commission was tasked with rate-setting in the § 252 context, it took the Bureau *28 months* to issue its *initial* decision on rates and another *20 months* to issue further rulings clarifying its initial ruling.[190] There is no basis to adopt Global Crossing's proposal for "baseball style" arbitration.

[189] *See Global NAPs, Inc. v. Verizon New England Inc.*, 444 F.3d 59, 70 (1st Cir. 2006) (rejecting a state commission's claim that an "'arbitration' [under] § 252(b) . . . should [be] treat[ed] . . . as [an] arbitral decision[] under the FAA").

[190] *See Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 17722 (2003); *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 20 FCC Rcd 5279 (2005).

## CONCLUSION

The Commission should adopt an analytical framework that is consistent with Verizon's comments and reply comments.

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